No. 98-1904

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE, AND
UNITED STATES DEPARTMENT OF STATE, PETITIONERS

v.

LESLIE R. WEATHERHEAD

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO RESPONDENT'S OPPOSITION TO MOTION TO VACATE THE JUDGMENT OF THE COURT OF APPEALS

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TABLE OF AUTHORITIES

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Respondent's opposition to vacatur attempts to transform the equitable doctrine of vacatur into a straitjacket. Respondent insists (Br. 6-8, 13) that this Court must focus exclusively on the technical question of which party took the last procedural step in a case that became moot, rather than on the overall circumstances and conduct of the parties. This Court's jurisprudence of vacatur, however, is not so mechanistic. To the contrary, this Court has repeatedly stressed that the vacatur determination "is an equitable one" with an "emphasis on fault." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 26, 29 (1994). The Court's power is to do what "justice may

require" (*id.* at 21) (quoting *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671, 677 (1944)), keeping in mind whether the "extraordinary course of this litigation" (*Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 74 (1997)) or the "vagaries of circumstance[s]" (*Bonner Mall*, 513 U.S. at 25) have prevented a petitioner, through no fault of its own, from obtaining review of adverse precedent through the ordinary course of appellate review.

1. Vacatur is appropriate in this case first because it was the "unilateral action of the party who prevailed in the lower court" that set in motion the series of events that has denied the United States the opportunity to obtain review on the merits of the Ninth Circuit's judgment. *Arizonans for Official English*, 520 U.S. at 72 (quoting *Bonner Mall*, 513 U.S. at 23). Although respondent accuses (Br. 1, 2, 5, 11) the government of attempting to manipulate the judicial process, what is noticeably absent from respondent's opposition to our motion to vacate the court of appeals' judgment is *any* explanation of why, less than three weeks before the scheduled date of oral argument, respondent chose to reveal for the first time in this litigation critical information that he has possessed for five years—indeed, since before this litigation ever commenced.

a. In his brief on the merits, in which respondent first disclosed that the British Consul in Seattle had summarized the critical section of the letter for him (Br. 6, 38 n.17, 48-49), respondent attempted to justify his tardy revelation as prompted by the government's representation concerning the Labour government's view regarding disclosure of the document. That representation, however, was made during the oral argument before the *court of appeals*—more than eighteen months and numerous procedural stages earlier in this

case—and therefore does not justify respondent's failure to disclose the letter in the eighteen months since. See Gov't Mot. to Vacate 12-13 & n.3. Nor does that representation in the court of appeals furnish any logical explanation for respondent's failure to disclose the letter prior to that time, because the Consul's letter was written at a time when the Conservative Party, not the Labour Party, was in power. Furthermore, because respondent was in possession of the letter during the time the case was before the district court, he was obligated to introduce it into the record then if he was going to rely on it at all, not withhold the letter from the record at that time and then reveal it for the first time as extra-record evidence in this Court. *Id.* at 11 & n.2. Even if respondent had proceeded in the proper way and tried to introduce the letter into the record after entry of judgment in the district court—by filing a motion in the district court under Federal Rule of Civil Procedure 60(b)(2)—he could not have succeeded, because the British Consul's letter, while unquestionably material, is plainly not "newly discovered."

Nor could respondent, who is himself an attorney, plausibly claim that he was unaware of the materiality to this case of an *official British government disclosure to respondent* when the United States' entire defense was predicated, from the outset, upon the British government's desire for confidentiality and the fact that the British government itself had refused to release the document. Indeed, respondent's actions in the district court belie any such claim. After respondent lost before the district court, he moved to set aside the judgment, under Rule 60(b)(6), revealing that an unnamed official in the British government had disclosed the letter's contents to an unidentified acquaintance of respondent.

See Gov't Opening Br. 8 n.5; J.A. 52-56.[1] Without confirming the correctness of respondent's recitation of what he had been told, the government opposed his motion on the ground that unauthorized disclosures, in any event, do not waive the applicability of Exemption 1. See Def. Opp. to Pl's. Mot. to Set Aside J. 2-8. In particular, the government argued that respondent needed to establish an "official and documented disclosure" to prevail. *Id.* at 7. It is thus inconceivable that the relevance of the British Consul's "official and documented disclosure" of a critical and sensitive part of the classified letter never occurred to respondent.[2]

Although respondent relied on the Consul's letter in his brief on the merits in this Court (at 38 n.17, 48-49) to argue that there was no legitimate basis for withholding all of the July 1994 letter that is the subject of this FOIA case, he now seeks to minimize the significance of the Consul's letter by characterizing it as pertaining only to "a single reference in the Extradition Letter." Mot. Opp. 7. Prior to the State Department's release of the classified letter last week, respondent, of course, had not received any official confirmation from the United States government about whether the Consul's letter revealed a portion or the entirety of the classified letter. At every stage of this litigation, however, respondent has argued that at least any portions of the classified letter that were in the public domain should be disclosed — just as he argued that

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[1] Respondent explained that he was putting the new information into the record to "provide[] at least some basis to grapple on appeal with the merits of the Court's judgment" and "so as to be able to offer an intelligent argument to the Court of Appeals on the question whether the letter should be released." J.A. 55.

[2] Respondent's opposition to our motion notably omits any discussion of his Rule 60(b)(6) motion.

very point in his merits brief filed two weeks ago in this Court (at 48-49), albeit relying for the first time on the Consul's letter. Yet his opposition offers no explanation for why, since he now considers the letter critically relevant to his segregability claim (*ibid.*), respondent did not consider the letter equally relevant some time before this Court granted certiorari and before respondent received our opening brief.

There is no merit to respondent's effort (Mot. Opp. 7) to blame the government for failing to learn about this information during discovery in the district court. The standard procedure in a FOIA case, which was followed here, is for the government to submit the declarations of responsible government officials setting forth the basis for withholding, and for the court then to decide whether summary judgment should be granted on the basis of those declarations. It is up to the party *opposing* summary judgment for the government to put in evidence that may raise a genuine issue of material fact. Fed. R. Civ. P. 56(e). The government is under no obligation to engage in discovery to see whether the plaintiff has such information, and it is entirely reasonable and fair for the government to proceed on the assumption that the plaintiff will come forward with any such evidence if he has it. Indeed, it is entirely reasonable and fair to expect a FOIA requester to provide such evidence when requesting information from the agency in the first place.

Nor does respondent explain what more the United States government could or should have done to verify the British government's opposition to disclosure. See Mot. Opp. 7 (accusing the government of failing "to carefully examine the premises" of its classification judgment). The British Home Office and Foreign and Commonwealth Office in London voiced the British

government's objection to disclosure in a letter to the State Department when notified of respondent's FOIA request (see Resp. Opp. App. 30a-31a), and State Department and Justice Department officials repeatedly verified that position at every stage of this litigation. Whether the British government in London should or should not have been cognizant of a letter written by the British Consul in Seattle is irrelevant. The significant point for present purposes is that the *United States government* was in no position to comb the files of a foreign government before crediting that government's repeated representations to Executive Branch officers charged with conducting the Nation's foreign policy.

b. Respondent next tries to avoid his share of responsibility for the current situation by insisting (Mot. Opp. 4-5, 7-8, 13) that the contents of the Consul's letter were not critically revealing. The short answer is that the British government thought otherwise.[3] The United States protected the letter's confidentiality because of the British government's expectation of confidentiality and that government's repeated objections (which were reasonable, in the view of the State Department) to disclosure of its confidential communication about an extradition matter of extreme political sensitivity. The importance the British government attached to the matters revealed in the Consul's letter, moreover, is understandable. Concerns about the fairness of the trial for the defendants were what inspired such heated and prolonged debate in Britain about the extradition. Written on the heels of that

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[3] Apparently, the Home Secretary's discussion of the problem of local prejudice also was the portion of the July 1994 letter that the British Consul in Seattle thought most relevant to disclose.

political firestorm, the nature and content of the Home Office's letter to the United States government and the tone of the communication were matters of great domestic political delicacy and sensitivity in Great Britain. In particular, the letter included the explanation that the Home Secretary had declined to seek an undertaking from the United States government that the trial of respondent's client would be moved to another neutral State, on the ground that "the place of the trial is, of course, for the US authorities to decide." Gov't Mot. to Vac. App. 4a. The British Consul's letter revealed that critical information by making clear that the British government had chosen to leave the place of trial to the United States authorities, notwithstanding the political pressure concerning the matter in Britain. Whether respondent—or the United States government for that matter—would consider disclosure of that information sufficient to warrant the British government's change in position about the need for confidentiality of the July 1994 letter is beside the point. What is critical is that the prior revelation by its own Consul in Seattle—of which the responsible officials in the British government in London were not previously aware—led the *British government* to conclude that confidentiality was no longer necessary and, indeed, that the letter should be released.[4] When respondent

[4] An additional answer is that respondent himself also thought the disclosure was significant at the time he filed his merits brief, in which he contended (Br. 48) that, in light of the Consul's letter, "a substantial amount of information about this two-page letter is already in the public domain." The only other public information to which respondent refers (beyond his surmise about the doctrine of dual criminality) is the government's brief description of the document for purposes of *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974), a disclosure which ob-

finally revealed the existence of the British Consul's letter, the United States government immediately brought it to the attention of the British government so that it might consider whether it continued to object to disclosure, in light of the revelations the Consul's letter contained. The United States government brought the letter to the British government's attention not, as respondent contends (Mot. Opp. 2), to avoid "the inconvenience of adversarial litigation," but because updating the British government and inquiring further about their views is precisely what officers of this Court—especially government lawyers, see *Berger* v. *United States*, 295 U.S. 78, 88 (1935)—should do when confronted with important new information about pending litigation. It also is precisely what the Executive Order envisions, by requiring individualized assessments of the damage to national security that disclosure of a particular document portends (see Gov't Br. 32-33; Gov't Reply Br. 5).

Moreover, once the British government independently determined that it no longer objected to disclosure and, indeed, that the letter should be released, the United States government could not, consistent with its obligations under the Executive Order and FOIA—not to mention its obligations to this Court, respondent, and the public—continue to keep the letter classified and withhold it from respondent. The basis for the State Department's judgment that disclosure would damage the national security by breaching the trust of an important ally in the sensitive area of international law enforcement cooperation had evaporated due to the actions of the British government. The State

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viously cannot be considered substantial or significant under FOIA.

Department (and the lawyers representing it) could not, as respondent apparently would have it (Mot. Opp. 7-8, 13), have pretended that the disclosure was not significant—it obviously was—or delayed in declassifying the letter. See Exec. Order No. 12,958, § 3.2(a) (1996) ("Information shall be declassified *as soon* as it no longer meets the standards for classification under this order.") (emphasis added).

What the State Department was required to do here is a far cry from the volitional, deliberate, and preplanned mooting of a case through settlement that this Court addressed in *Bonner Mall*. Here, the Ninth Circuit's judgment has become unreviewable not by the government's "own choice," *Bonner Mall*, 513 U.S. at 25, but by circumstances that respondent set in motion, which then triggered an independent decision by the British government, which then gave the United States government no choice under the law but to declassify the letter and release it to respondent. Thus, while the government admittedly took the last step, mooting the case was an entirely foreseeable consequence of respondent's belated disclosure of critical information.

The intervening change in position by the British government, which removed the basis for classification and thus fundamentally changed the face of this litigation, undercuts respondent's reliance on *Bonner Mall* in another respect as well. The situation is analogous to mootness caused by intervening legislation, which has been held not to fall within *Bonner Mall*'s limitation on vacatur. See, *e.g.*, *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997) ("The mere fact that a legislature has enacted legislation that moots an appeal, without more, provides no grounds for assuming that the legislature was motivated by such a manipulative purpose."); see also

American Library Ass'n v. *Barr*, 956 F.2d 1178, 1187 (D.C. Cir. 1992) (vacatur appropriate where a case became moot on appeal due to Congress's passage of new legislation, because Congress's action "to repair what may have been a constitutionally defective statute * * * represents responsible lawmaking, not manipulation of the judicial process"). Moreover, just as "the respect that courts owe other organs of government should make [them] wary of impugning the motivations that underlie a legislature's actions," *National Black Police Ass'n*, 108 F.3d at 352, this Court should decline respondent's invitation (Mot. Opp. 14 n.6) "to impute such manipulative conduct" to a foreign sovereign or to apply in these circumstances "a doctrine that appears to rest on the likelihood [that] a manipulative purpose" (108 F.3d at 352) animated Executive Branch officials in their dealings with an important ally.[5]

2. In weighing the relevant equities, it also is significant that respondent has no personal equity in seeking to retain the Ninth Circuit's judgment in place. He has received the document he requested, and he has no broader personal interest in insisting that a particular rule of law remain in effect in the Ninth Circuit to govern the future disclosure of documents to members of the public generally.

Because vacatur is an equitable doctrine, consideration of the entire circumstances occasioning mootness —and not just the last step—is required.[6] Further-

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[5] With respect to respondent's claim (Mot. Opp. 5) that somehow *his* delay in disclosing information is a mere "fig leaf to cover [the government's] withdrawal from an untenable legal position," we believe that our opening brief and reply brief at the merits stage speak for themselves.

[6] Cf. *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945) ("[t]he guiding

more, the equitable doctrine of vacatur should be applied in a manner that promotes rather than "disturb[s] the orderly operation of the federal judicial system." *Bonner Mall*, 513 U.S. at 27. Indeed, "[f]rom the beginning [this Court] ha[s] disposed of moot cases in the manner '"most consonant to justice" . . . in view of the nature and character of the conditions which have caused the case to become moot.'" *Bonner Mall*, 513 U.S. at 24 (quoting *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 477-478 (1916), and *South Spring Gold Mining Co.* v. *Amador Gold Mining Co.*, 145 U.S. 300, 302 (1892)).

Here, "[i]t would certainly be a strange doctrine that would permit a plaintiff to obtain a favorable judgment" without revealing important information, "take voluntary action [that] moot[s] the dispute, and then retain the [benefit of the] judgment," *Arizonans for Official English*, 520 U.S. at 75 (this Court's brackets), simply because the government responded to the unexpected developments in the responsible and straightforward manner required by law and expected of officers of the Court. Because mootness occurred as a result of the government's *adherence* to "orderly procedure" in response to changed circumstances beyond its control, rather than as a result of an independently volitional decision by the government to "step[] off the statutory path" established for review of adverse judgments, "the public interest is best served by granting relief" in the form of vacatur. *Bonner Mall*, 513 U.S. at 27.

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doctrine" in equity is the "maxim that 'he who comes into equity must come with clean hands'"; equity is a "vehicle for affirmatively enforcing the requirements of conscience and good faith").

Respondent asserts (Mot. Opp. 11) that granting vacatur under these circumstances "could become a weapon" for the government to "'reverse by mootness' any FOIA or Administrative Procedure Act precedents with which the government disagrees." It is utterly implausible to suppose that granting vacatur in the circumstances of this case would raise the specter of the government filing meritless appeals and petitions for writs of certiorari solely in the hope that the *other side* will later reveal critical, previously undisclosed information that will then cause a third party to take action that then leaves the United States no choice but to release a document, which will then allow the government to seek vacatur of the underlying judgment before a decision on the merits issues. Merely to state respondent's speculative chain of events is to refute it.

3. Finally, as we explain in our motion to vacate (at 15-19), just as this Court weighed federalism concerns in deciding that vacatur was appropriate in *Arizonans for Official English*, 520 U.S. at 75, the substantial separation-of-powers concerns raised by the Ninth Circuit's decision, and the consequent chilling effect on the Executive Branch's conduct of the Nation's foreign relations, weigh strongly in favor of vacatur in this case. Respondent's only answer to that argument is to insist that the court of appeals' decision could have no such impact because it concerned only "the classification of this one letter" under the terms of the new Executive Order. Mot. Opp. 13. But this Court does not grant a writ of certiorari to correct such narrow, record-bound errors. And, in fact, the impact of the court of appeals' decision is much broader. The Ninth Circuit has, in a published opinion, imposed a reading of the President's Executive Order that significantly re-

stricts the Executive Branch's ability to protect the confidences of foreign governments and that will therefore erode the willingness of other governments to share sensitive information with the United States or to engage in candid dialogue regarding matters of importance to the Nation's foreign relations.[7]

Whether or not the Ninth Circuit's decision is correct, it should not be permitted to stand unreviewed in light of those adverse consequences. Vacatur is not reversal. We do not and could not ask this Court to rule in favor of the government on the merits. We simply request the Court to restore the status quo ante in the Ninth Circuit. Vacatur is the only means of ensuring that the Ninth Circuit's decision—which this Court found sufficiently significant to warrant review—does not undermine the framework within which the United States can engage in candid diplomatic dialogue about matters of importance to the Nation's foreign affairs.

Respondent objects (Br. 14) that this Court cannot "peek" at the merits of a case in deciding whether vacatur is appropriate. But recognizing that certain decisions, regardless of their unreviewed merit, have a unique inter-branch impact and raise fundamental concerns going to the structure of our government is a significant step removed from a merits-based analysis, as this Court recognized in *Arizonans for Official English*, *supra*. It simply reflects the well-established rule that vacatur is appropriate "to prevent a judgment, unreviewable because of mootness, from spawn-

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[7] The Ninth Circuit is home to the second largest number of FOIA filings in the country. See Office of Information and Privacy, Dep't of Justice, *Calendar Year 1998 Report to Congress on FOIA*, (list of FOIA Cases Received in 1998), *available in* www.usdoj.gov/04foia/98receiv.htm.

ing any legal consequences." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 41 (1950). That doctrine, in turn, is based in equity's traditional concern that the public interest be considered in affording relief. See *Bonner Mall*, 513 U.S. at 26 ("As always when federal courts contemplate equitable relief, our holding must also take account of the public interest."); *Precision Instrument Mfg. Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945). Absent vacatur, the status quo is a judgment that never would have issued had respondent disclosed the British Consul's letter in a timely fashion. That ruling now threatens to chill the Executive Branch's conduct of foreign relations and, in turn, to affect the amount of protection other governments afford the confidences of the United States. Thus, the relevant equitable considerations all weigh in favor of vacatur as the disposition "most consonant to justice" (*Bonner Mall*, 513 U.S. at 24 (quoting *Hamburg-Amerikanische*, 239 U.S. at 478) in this case.[8]

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[8] Despite respondent's failure to disclose the British Consul's letter in the district court, we do not oppose vacatur of the district court's judgment as well (which was in favor of the government). See *Arizonans for Official English*, 520 U.S. at 75 (exceptional circumstances and federalism concerns combine to make "vacatur down the line * * * the equitable solution").

For the foregoing reasons and for those stated in our motion to vacate the judgment of the court of appeals, the Court should vacate the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case to that court with directions to vacate the judgment of the district court and remand to that court for dismissal of the case as moot.

Respectfully submitted.

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DECEMBER 1999